STATE of INDIANA

INDIANA UTILITY REGULATORY COMMISSION
302 W. WASHINGTON STREET, SUITE E-306
INDIANAPOLIS, INDIANA 46204-2764

http://www.state.in.us/iurc/
Office: (317) 232-2701
Facsimile: (317) 232-6758

IN THE MATTER OF THE VERIFIED PETITION OF VERIZON NORTH INC. AND CONTEL OF THE SOUTH INC. D/B/A VERIZON NORTH SYSTEMS FOR THE PROTECTION OF CONFIDENTIAL AND PROPRIETARY INFORMATION IN SCHEDULE G-5 SUPPLEMENT OF THEIR ANNUAL REPORTS FILED WITH THE COMMISSION

CAUSE NO. 42845

You are hereby notified that on this date the Presiding Officer in this Cause made the following Entry:

On April 25, 2005, Verizon North, Inc. and Contel of the South, Inc. d/b/a Verizon North Systems ("Verizon") filed its *Verified Petition for Protection of Confidential and Proprietary Information* ("Petition") with the Indiana Utility Regulatory Commission ("Commission"), seeking confidential treatment of certain designated responses to the Commission-issued *Local Exchange Carrier Annual Report for Year End 2004* ("2004 Report").

The 2004 Report responses for which Verizon seeks confidential protection are described as "the residential and business single access line and multi-line business access line information per central office." Verizon is requesting that its responses to subsection Schedule G-5 Supplement of the 2004 Report be treated as confidential information.

Verizon seeks confidential protection pursuant to I.C. 8-1-2-29 and the Commission's procedural rule found at 170 I.A.C. 1-1.1-4, and relies on the trade secret exception to public disclosure of public records found at I.C. 5-14-3-4 and I.C. 24-2-3-2 as the basis for its confidentiality claim.

The Commission rule found at 170 I.A.C. 1-1.1-4 establishes procedures for claiming that material to be submitted to the Commission is confidential. This rule, among other requirements, states that a written application for a finding of confidentiality must be filed on or before the date (if any) the material is required to be filed (170 I.A.C. 1-1.1-4(a)), and the application shall be accompanied by a sworn statement or testimony that describes: the nature of the confidential information, the reasons why the material should be treated as confidential pursuant to I.C. 8-1-2-29 and I.C. 5-14-3, and the efforts

made to maintain the confidentiality of the material. 170 I.A.C. 1-1.1-4(b). Material filed with or submitted to the Commission prior to a finding of confidentiality is available for public inspection and copying. 170 I.A.C. 1-1.1-4(e).

Ten (10) days following receipt of an application for confidentiality the Commission may: (1) find the information to be confidential in whole or in part; (2) find the information not to be confidential in whole or in part; (3) issue a protective order or docket entry covering the information; and/or (4) find that information found to be not confidential should be filed in accordance with 170 I.A.C. 1-1.1-4. 170 I.A.C. 1-1.1-4(a). The Presiding Officer or any party may request an *in camera* inspection to hear argument on confidentiality of the material. 170 I.A.C. 1-1.1-4(c).

I.C. 8-1-2-29, a statute of specific applicability to the Commission, recognizes the relevancy of the Access to Public Records Act to the Commission's public records. I.C. 8-1-2-29(a) states:

> All facts and information in the possession of the commission and all reports, records, files, books, accounts, papers, and memoranda of every nature whatsoever in its possession shall be open to inspection by the public at all reasonable times subject to I.C. 5-14-3.

Indiana's Access to Public Records Act, found at I.C. 5-14-3, begins with an unambiguous policy statement that favors public disclosure of government information. I.C. 5-14-3-1 states:

> A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

The Indiana Utility Regulatory Commission, by application of the definition found at I.C. 5-4-3-2, is a "public agency:"

> "Public agency" means the following:
>
> (1) Any board, commission, department, division, bureau, committee, agency, office, instrumentality, or authority, by whatever name

designated, exercising any part of the executive, administrative, judicial, or legislative power of the state.

I.C. 5-14-3-2 broadly defines a "Public record" as:

> ...any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

A public agency must make its public records available for inspection and copying. "Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, **except as provided in section 4 of this chapter**." I.C. 5-14-3-3(a). Emphasis added.

"Section 4" of I.C. 5-14-3 (I.C. 5-14-3-4) contains two (2) lists of public records that are nondisclosable. The first list, found at I.C. 5-14-3-4(a), describes those public records that a public agency may not disclose, unless access is specifically required by state or federal statute or ordered by a court under the rules of discovery. The second list, found at I.C. 5-14-3-4(b), describes public records that are nondisclosable at the discretion of a public agency. The public records at issue in this proceeding are public records that are claimed to contain trade secrets. "Records containing trade secrets" are excepted from public disclosure under I.C. 5-14-3-4(a)(4) and, therefore, fall within the category of public records that a public agency may not disclose.

The Access to Public Records Act, at I.C. 5-14-3-2, states that "Trade secret' has the meaning set forth in I.C. 24-2-3-2." Indiana's adoption of the Uniform Trade Secrets Act is found at I.C. 24-2-3, and contains the following definition:

> 'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Indiana Courts describe trade secret information as containing four (4) elements: 1) information; 2) deriving independent economic value; 3) not generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and 4) the subject of efforts, reasonable under the circumstances to

maintain it secrecy. *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 813 (Ind. App. 2000).

In several previous Orders the Commission has considered and decided requests by some telephone companies to treat certain access line information as trade secret. Confidentiality of access line information has been an issue for some telephone companies not only in regard to the annual competition surveys conducted by the Commission, but also with respect to access line information that the Commission requests in the Annual Reports that telephone companies, as well as all other public utilities, are required to submit to the Commission.

In its May 8, 2003 Order in consolidated Cause Nos. 42192, 42401, 42403, 42406, and 42429 the Commission found that access line information requested in the *2002 Local Competition Survey* did not constitute trade secret information. Relying on the same reasoning as applied in consolidated Cause Nos. 42192 *et al.*, the Commission determined in its June 26, 2003 Order in consolidated Cause Nos. 42427, 42428, 42430, 42431, 42432, 42433, 42434, 42435, 42437, 42438, 42439, 42440, 42441, and 42442 that access line information requested in the *2002 Annual Report* did not constitute trade secret information. Part of the reasoning to deny requests for confidential treatment of access line information in these two consolidated Causes was based on the immature state of competition among telephone companies in Indiana.

Requests for confidentiality of access line information was also considered by the Commission in its January 28, 2004 Order in consolidated Cause Nos. 42537, 42540, 42542, 42544, and 42545. The Commission concluded in this Order that, because of an increased level of competition among Indiana telephone companies, certain access line information in the *2003 Local Competition Survey* constituted trade secret information. This same reasoning was followed in the Commission's June 30, 2004 Order in consolidated Cause Nos. 42625, 42626, 42633, 42634, 42636, 42637, and 42638, wherein it was determined that certain access line information in the *2003 Annual Report* constituted confidential, trade secret information.

Thus, the Commission has recently determined that certain access line information can constitute trade secret information. Such recent determinations, however, do not relieve any person desiring confidential protection of a public record to be submitted to the Commission of the obligation to petition and factually demonstrate that the information should be exempt from public disclosure.

Accompanying the Petition was the *Verification of Lori Macklin* ("Verification"), which verified under oath that the assertions in the Petition regarding the measures taken to maintain the confidentiality of the requested documents were true. Ms. Macklin is Asst. Vice President of Verizon's Regulatory and Government Affairs. We look to the Verification for factual information sufficient to satisfy the requirements of 170 I.A.C. 1-1.1-4 and each of the elements comprising the statutory definition of trade secret.

Verizon seeks confidential protection of its responses to the 2004 Report which will reveal the number of access lines per central office as of December 31, 2004. Responses to this 2004 Report inquiry will be in the form of numeric information. The Petition states that this information is not readily ascertainable, in that the information is not an estimate derived by methods available to competitors so that they could readily and accurately make a similar calculation. The Petition further asserts, with respect to the information deriving independent economic value, that disclosure of this information would be useful to current or potential competitors to evaluate market potential and/or market entry decisions. The Petition also describes the efforts Verizon has undertaken to maintain the secrecy of the information, including physical access restrictions, distribution of the information on a "need to know" basis, and password protection of electronic information systems.

The Presiding Officer, having reviewed the Petition and its accompanying Verification, finds that there is a sufficient basis for a preliminary determination of confidentiality with respect to the designated 2004 Report responses that are identified above. The Petition and Verification contain sufficient descriptions of the nature of the information for which confidential treatment is sought. They present factual information sufficient to show that the designated Report responses, due to be submitted to the Commission by May 2, 2005, contain information that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. They also present factual information sufficient to show that Verizon has made efforts that are reasonable under the circumstances to maintain secrecy of the information for which confidential treatment is sought.

Accordingly, within seven (7) days of the date of this Entry, Verizon should hand deliver to Commission Principal Telecommunications Analyst Mark Bragdon, in a sealed envelope that is clearly marked "confidential" and with the Cause Number noted thereon, its responses to Schedule G-5 Supplement of the 2004 Report. As with all information provided to the Commission pursuant to a finding of confidentiality, the responses should be submitted on green paper, thereby readily identifying the information as confidential. Verizon's responses to Schedule G-5 Supplement of the 2004 Report should, on a preliminary basis, be handled and maintained by the Commission as confidential in accordance with I.C. 5-14-3.

IT IS SO ORDERED.

Lorraine Hitz-Bradley, Administrative Law Judge

April 28, 2005

Date